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Supreme Court U.S.
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No. 02-430

In The
Supreme Court of the United States

LLEH, INC., doing business as BABE'S; APRIL COOPER, ANITA JACKSON, SARAH BLACKSTOCK,

Petitioners,

v.

WICHITA COUNTY, TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

BARRY L. MACHA
Criminal District Attorney
Wichita County, Texas

DOUGLAS L. BAKER
Counsel of Record
WICHITA COUNTY CRIMINAL DISTRICT ATTORNEYS OFFICE
900 7th Street, Suite 351
Wichita Falls, Texas 76301
(940) 766-8113
(940) 766-8177 *telecopier*
doug.baker@co.wichita.tx.us

Attorney for Respondent

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
REASONS FOR DENYING THE WRIT	1
OPINIONS BELOW	1
STATEMENT OF THE CASE	1
ARGUMENT	3
I. Wichita County's Sexually Oriented Business Order IS NOT in conflict with *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1975), or *City of Los Angeles v. Alameda Books, Inc., et al.*, ___ U.S. ___, 122 S. Ct. 1728 (May 13, 2002), regarding Wichita County's use of studies from other areas	3
II. Wichita County did assess other areas of the County in which Sexually Oriented Businesses could locate and still comply with the distance requirements contained in the County's Order	7
III. The Fifth Circuit's holding that the County's Order concerning interior distance and open view is correct and does not conflict with *O'Brien*, *Ward*, and *Turner*	9
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES:

City of Los Angeles v. Alameda Books, Inc., et al., ___ U.S. ___, 122 S. Ct. 1728 (May 13, 2002) 1, 5

City of Renton, et al. v. Playtime Theatres, Inc., et al., 475 U.S. 41 (1986) 4

Colacurcio v. City of Kent, 163 F.3d 545 (9th Cir. 1998), *cert. denied*, 529 U.S. 1053, 146 L. Ed. 2d 459, 120 S. Ct. 1553 (2000) 11

Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, 274 F.3d 377 (6th Cir. 2001) 11

DLS, Inc., et al. v. City Of Chattanooga, et al., 107 F.3d 403 (6th Cir. 1997) 10, 11

Jake's, Ltd., Inc., et al. v. City of Coates, 284 F.3d 884 (8th Cir. 2002) 11

Kev, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986) 11

Lakeland Lounge of Jackson, Inc. v. The City of Jackson, Mississippi, 973 F.2d 1255 (5th Cir. 1992) 8

LLEH, Inc., etc., et al. v. Wichita County, Texas, 289 F.3d 358 (5th Cir., April 22, 2002) 11

United States v. Albertini, 472 U.S. 675 (1985) 5

REASONS FOR DENYING THE WRIT

Respondent respectfully requests this Court deny the petition for writ of certiorari. The Court of Appeals for the Fifth Circuit correctly concluded that the Sexually Oriented Business Order enacted by the Respondent was constitutional, and did not violate the First Amendment rights of the Petitioners. Further, the decision of the Court of Appeals does not conflict with earlier cases decided by this Court, including *City of Los Angeles v. Alameda Books, Inc., et al.*, ___ U.S. ___, 122 S. Ct. 1728 (May 13, 2002).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit dated April 22, 2002, is reprinted at page 1 of the Appendix to the Petition for Writ of Certiorari ("Pet. App."). The Findings of Fact and Conclusions of Law along with the Final Judgment of the United States District Court for the Northern District of Texas, Wichita Falls Division (Chief Judge J. Buchmeyer presiding), dated September 9, 2000, are reprinted at page 2 of the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

Wichita County, Texas, is a county of approximately 628 square miles and a population of 131,664. Within its borders lies the county seat, Wichita Falls (pop. 107,000), and three smaller towns with populations under 10,000 each. The Texas Constitution and relevant State law provides that each county is governed by a five member

Commissioners Court, comprised of four Commissioners elected from 4 separate precincts within the County, and one county judge, elected by the entire county voting population.

On December 6, 1999, acting under the authority of *Texas Local Government Code §§ 243.001 et. seq.*, the Wichita County Commissioners Court enacted its first Sexually Oriented Business Order, designed to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the County by providing for the licensing and regulation of sexually oriented businesses in the unincorporated areas of Wichita County, Texas.

While it was true that the planned opening of Wichita County's first all-nude club ("Babe's") prompted the County Commissioners to look at enacting a Sexually Oriented Business Order (the "Order"), it is not true that the Order was enacted solely in response to the planned opening of "Babe's", or to put the club out of business.[1] It was simply time to enact such an order to regulate not only "Babe's", but all future businesses of this type that chose to locate in Wichita County.

> Even if it is alleged the governmental entity was motivated by a desire to restrict First Amendment rights, an ordinance is not invalid because a court must not "strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive." *City of Renton, et al. v.*

[1] As stated in Petitioners' Petition for Writ of Certiorari, p. 7.

Playtime Theatres, Inc., et al., 475 U.S. 41, 48 (1986).

Prior to enacting the Order, the County Commissioners held no less than three public hearings on the proposed order. Additionally, before the Order was passed, the County heard from a real estate appraiser who advised that these types of businesses generally drive down the property values in the area they are located. Importantly, the Court also heard from Tony Ramirez, a City of Wichita Falls police officer who had been assigned to the Vice unit of that Police Agency. He testified that Wichita Falls has several sexually oriented businesses within its city limits, and it has been his personal experience that these businesses have a sharp increase in the amount of crime in and around them, particularly illegal drug use and transactions, as well as prostitution. It was only after these public hearings, and review of the studies from other jurisdictions as to the effects of these types of businesses, that the County enacted its Order.

ARGUMENT

I. Wichita County's Sexually Oriented Business Order IS NOT in conflict with *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1975), or *City of Los Angeles v. Alameda Books, Inc., et al.*, ___ U.S. ___, 122 S. Ct. 1728 (May 13, 2002), regarding Wichita County's use of studies from other areas.

Petitioners believe that the studies used by Wichita County were worthless for the County to use in

determining the content of its Order regulating Sexually Oriented Businesses in the County,[2] mistakenly believing that the County's Order was adopted to put "Babe's" out of business. On the contrary, Wichita County did exactly what the *Renton*[3] Court said is reasonable:

> "The Court of Appeals ruled, however, that because the Renton ordinance was enacted without the benefit of studies specifically relating to "the particular problems or needs of Renton," the city's justifications for the ordinance were "conclusory and speculative." 748 F.2d, at 537. We think the Court of Appeals imposed on the city an unnecessarily rigid burden of proof."

It must be remembered that the County looked at the studies from other jurisdictions not to determine how to draft their Order, but primarily to look at the secondary effects of these types of businesses. If a sexually oriented business increased the incidence of crime in and around its location, is it relevant whether that business is located in New York City, Houston, Texas, or Wichita County, Texas? Of course not. And for "Babe's" to argue that "[they] are out in the county with no other businesses around, the Sheriff said we violated no state laws, and our residential neighbor had experienced no problem with the Club,"[4] would seem to be an attempt by "Babe's" to try to rope the County into doing exactly what the County should not do: enact a Sexually Oriented Business Order tailored to only

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[2] Petitioners' Petition for Writ of Certiorari at p. 7.

[3] *City of Renton, et al. v. Playtime Theatres, Inc., et al.*, 475 U.S. 41 (1986).

[4] See Petitioners' Petition for Writ of Certiorari, fn. 7 at p. 6.

one business in only one location. Petitioners here mistakenly believe that by saying their club,"Babe's" (in operation for a mere seven months at the time of trial), produced no undesirable secondary effects, then they have successfully furnished evidence that disputes the County's factual findings.[5] This Court has previously held that regulations such as Wichita County's must be evaluated for their "general effect", and not as applied to only one location. *United States v. Albertini*, 472 U.S. 675, 688-698 (1985). Therefore, when Petitioners', in their *Question #2 Presented*, state that " . . . the club caused no secondary effects in the rural area in which it was located . . . successfully disput[es] the county's factual findings.", incorrectly states the County's burden.

The County's factual findings[6] were that sexually oriented businesses, due to their nature, have serious objectionable operational characteristics, including frequent unlawful sexual activities, including prostitution, and sexual liaisons of a casual nature. Therefore, based on the previously published studies reviewed by the Commissioners, and findings about Sexually Oriented Businesses generally, the Order was adopted by Wichita County. The Petitioners never disputed that the studies relied upon by the County Commissioners were flawed in any way, but instead argued that *they did not apply to their particular club's location*. Again, it must be remembered that "Babe's" was the first sexually oriented business ever to be opened in Wichita County. As Justice Kennedy recently wrote:

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[5] Here Petitioners are apparently relying on the second alternative expressed by Justice O'Connor in the *Alameda* case.

[6] Contained in the County's preamble to its Order.

> Only after identifying the proposition to be proved can we ask the second part of the question presented: is there sufficient evidence to support the proposition? As to this, we have consistently held that a city must have latitude to experiment, at least at the outset, and that very little evidence is required. See, *e.g., Renton*, 475 U.S. at 51-52 ("The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses"); *Young*, 427 U.S. at 71 ("The city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems"); *Erie v. Pap's A. M.*, 529 U.S. 277, 300-301, 146 L. Ed. 2d 265, 120 S. Ct. 1382 (2000) (plurality opinion). As a general matter, courts should not be in the business of second-guessing fact-bound empirical assessments of city planners. See *Renton, supra,* at 51-52. The Los Angeles City Council knows the streets of Los Angeles better than we do. See *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 665-666, 129 L. Ed. 2d 497, 114 S. Ct. 2445 (1994); *Erie, supra*, at 297-298 (plurality opinion). It is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion. *City of Los Angeles v. Alameda Books, Inc., et al.*, ___ U.S. ___, 122 S. Ct. 1728, 1742-1743 (May 13, 2002).

There is no dispute that this was the first foray Wichita County has ever made into the area of regulating sexually oriented businesses. Therefore, the County must be allowed latitude to experiment with solutions appropriate for the County. To paraphrase Justice Kennedy:

> "The [Wichita County Commissioners Court] knows the streets of [Wichita County] better than we do. [Wichita County] is entitled to rely on that knowledge; and if its inferences appear reasonable, we should not say there is no basis for its conclusion." *Id.*

What Wichita County did was to "reasonably rely" on previous studies in enacting their order. And this they, and other local governments, should be allowed to do, especially when approaching these types of regulations for the first time.

ARGUMENT

II. Wichita County did assess other areas of the County in which Sexually Oriented Businesses could locate and still comply with the distance requirements contained in the County's Order.

Petitioners would have this Court believe that the County did not consider other areas of the County that Sexually Oriented Businesses could locate and still be in compliance with the County's Sexually Oriented Business Order. That is not true. At the meeting in which the Commissioners adopted Wichita County's Order, there was a discussion of other areas within the County to locate such businesses.[7] As Commissioner Presson stated, " . . .

[7] Respondent would point out that the Commissioner quotes cited in Petitioners' Petition for Writ of Certiorari at p. 20 were taken out of context. The statements made by these Commissioners were in response to a question posed by the attorney for the County (also the

(Continued on following page)

there's lots of areas [within Wichita County] that they can purchase land". Importantly, as stated by Petitioners "the unincorporated areas of Wichita County covers 633 square miles, or 405,120 acres of rural and agricultural land". (see Petitioners' Petition for Writ of Certiorari, fn. 17, at p. 20.)

This evidence seems to fit with the parameters opined by the Fifth Circuit in *Lakeland Lounge of Jackson, Inc. v. The City of Jackson, Mississippi*, 973 F.2d 1255, 1261 (5th Cir. 1992):

> Nothing in the instant record indicates that all or even most of the locations are inaccessible, unsafe, or without utilities or infrastructure or that legal obstacles exist to their use. *See Woodall*, 950 F.2d at 261-62; *Basiardanes v. City of Galveston*, 682 F.2d 1203, 1214 (5th Cir. 1982). Thus, although the record does not permit us to say with precision how many additional sites exist, a substantial number of potential sites do.
>
> Moreover, there is no requirement in *Renton, Woodall*, or elsewhere that a specific proportion of a municipality be open for adult businesses or that a certain number of sites be available.

The logical conclusion drawn from the Commissioners statements is that there is more than ample land within Wichita County to locate a Sexually Oriented Business;

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undersigned attorney) inquiring if the Commissioners knew of any land in their particular precincts upon which a Sexually Oriented Business could be located and not run afoul of the Order. The statements made by the Commissioners indicated that there were many other locations in the County where a Sexually Oriented Business could locate, and still comply with the County's order.

therefore, the County considered and identified reasonable alternative locations before passing its Order.

ARGUMENT

III. The Fifth Circuit's holding that the County's Order concerning interior distance and open view is correct and does not conflict with *O'Brien*, *Ward*, and *Turner*.

The issues regarding the six-foot buffer zone, 18 inch elevation requirement, and the open view, are, at least according to Petitioners' Brief, largely economic.[8] Nowhere in the record of this case can it be found that the Order enacted by the County will in any way interfere with the dancer's ability to convey their "erotic message". Interestingly, on several occasions, Petitioners argued that "they could live with a three foot rule". Rather than argue that the six foot rule eliminates the dancers ability to convey their message, the thrust of their argument is that the six

[8] Petitioner's Brief at p. 4: "The economic effect of the order was devastating."

Petitioner's Brief at p. 4: " . . . the elimination of so many tables would have reduced the club's income below the break-even point of $24,000 monthly."

Petitioner's Brief at p. 4: " . . . to remodel the club to satisfy the unobstructed view rule would cost $15,000 to $23,000.00. . . . "

Petitioner's Brief at p. 22: "The [6 foot] zone would cut the table count from 30 to 10, reducing revenues by 60%. . . . "

foot rule means that "Babe's" cannot have enough tables in its Club to turn a profit. However, economics have never been considered in any opinion of this Court regarding the First Amendment and erotic dance:

> "The inquiry for First Amendment purposes is not concerned with economic impact; rather, it looks only to the effect of the ordinance upon freedom of expression." *Young v. American Mini Theatres, Inc., et al.,* 427 U.S. 50, 78 (1976).

In the case of *DLS, Inc., et al. v. City Of Chattanooga, et al.,* 107 F.3d 403, 413 (6th Cir. 1997), the Sixth Circuit stated the proper way to evaluate the economic effects of the Regulations is as follows:

> We consider the economic effects of the ordinance in the aggregate, not at the individual level; if the ordinance were intended to destroy the market for adult cabarets, it might run afoul of the First Amendment, *but not if it merely has adverse effects on the individual theater*. See *Spokane Arcade, Inc. v. City of Spokane,* 75 F.3d 663, 665-66 (9th Cir. 1996) (emphasis mine).

As was stated earlier, Wichita County was concerned with enacting a Sexually Oriented Business Order to regulate ALL businesses (current and future) of this type within the County, not just "Babe's".

The Fifth Circuit said in this case:

> In addition, the district court's finding that the six-foot buffer would effectively close Babe's is not controlling. . . . "The [provision] does not ban all [partially or totally nude dancing], but instead focuses on the source of the evils the [County] seeks to eliminate . . . and eliminates them without at the same time banning or

> significantly restricting a substantial quantity of speech that does not create the same evils." *LLEH, Inc., etc., et al. v. Wichita County, Texas*, 289 F.3d 358, 368 (5th Cir., April 22, 2002) Quoting from *Ward, et al. v. Rock Against Racism*, 491 U.S. 781, 800 [footnote 7] (1989).

The Ninth Circuit addressed an almost identical argument involving distance regulations requiring dancers to be *ten feet* away from, and elevated *two feet* above patrons during their performances. In that case, that Court held:

> Further, these regulations do not significantly burden first amendment rights. While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired. Erotic dancers still have reasonable access to their market. *Kev, Inc. v. Kitsap County,* 793 F.2d 1053, 1061-62 (9th Cir. 1986).

Several other Federal Appellate Courts have upheld similar distance requirements as reasonable, content-neutral time, place, and manner restrictions. *Please see Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County,* 274 F.3d 377, 396-98 (6th Cir. 2001) (three feet); *DLS*, 107 F.3d at 408-13 (six feet); *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir. 1998), *cert. denied*, 529 U.S. 1053, 146 L. Ed. 2d 459, 120 S. Ct. 1553 (2000) (ten feet); *Jake's, Ltd., Inc., et al. v. City of Coates*, 284 F.3d 884, 891 (8th Cir. 2002) (two feet from the floor and no less than six feet from any patron).

Wichita County, like Kilsap County, Washington, wanted to insure that the undesirable secondary effects of a sexually oriented business[9] would be deterred as much as possible, so it enacted distance requirements. In fact, at one public hearing, County Commissioner J. Miller expressed a strong desire for a six foot dancer-to-patron rule by stating that the average length of a person's arm is three feet; therefore, at six feet, the dancer's outstretched arm should not be able to touch the patron's outstretched arm. This certainly seems to be a reasonable rule.

While it is true that constitutional issues are not concerned with economic impact, it is also true that the County's right to regulate Sexually Oriented Businesses should not be so unfettered as to allow the regulations to keep someone from opening such a business, or causing someone to be forced to close because the business cannot comply with the regulations.

That is certainly not the case here. The Commissioner's Court specifically provided in the Regulations to allow for amortization of an existing business to allow it to recover its expenses before being required to come into

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[9] WHEREAS, the Commissioner's Court finds that sexually oriented businesses are frequently used for unlawful sexual activities, including prostitution and sexual liaisons of a casual nature; and

WHEREAS, the concern over sexually transmitted diseases is a legitimate health concern of the County which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens ... (Preamble to Wichita County's Regulations for Sexually Oriented Businesses located in the Petitioners' Lodging).

compliance.[10] Further, in this case, the County specifically granted "Babe's" club a three- and one-half year extension to operate at its current location. And, at the end of that time, the club is not automatically required to close, but rather the Commissioner's Court will look at it again and determine if it has recouped its investment (or a substantial portion of it), or should be allowed to remain open for an additional period of time.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition.

Respectfully Submitted,

BARRY L. MACHA
Criminal District Attorney
Wichita County, Texas

DOUGLAS L. BAKER
Counsel of Record
WICHITA COUNTY CRIMINAL
DISTRICT ATTORNEYS
OFFICE
900 7th Street, Suite 351
Wichita Falls, Texas 76301
(940) 766-8113
(940) 766-8177 *telecopier*
doug.baker@co.wichita.tx.us

Attorney for Respondent

[10] See "Section VI – REQUIREMENTS FOR EXISTING ENTERPRISES" located on page 9 of the Petitioners' Lodging.